Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

MERCY HOSPITAL, INC.,
Petitioner,

v.

GREGORY FOGLEMAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual has standing to assert a claim against his employer under the Americans with Disabilities Act (ADA) 42 U.S.C. 12201 et seq alleging that he was discriminated against because a relative and co-employee had previously filed an ADA claim against the employer where the individual did not assert any rights under the ADA and did not participate in any way in his co-employee's ADA claim as required by 42 U.S.C. 12203(a).

2. Whether an individual who was perceived by an employer to have participated in a claim under the Americans with Disabilities Act has standing to sue for alleged discrimination.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Mercy Hospital, Inc. (Mercy), a corporate entity incorporated under the law of Pennsylvania. Mercy has no parent or publicly held company owning 10% or more of its stock. Mercy Hospital was the Defendant in the District Court, and the Appellee in the Third Circuit Court of Appeals.

Respondent

Respondent is Gregory Fogleman (Respondent), an individual citizen residing in the Middle District of Pennsylvania. Petitioner is unaware of any corporate affiliations of Respondent. Respondent was the Plaintiff in the District Court and the Appellant in the Third Circuit Court of Appeals.

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Petitioner respectfully petitions this honorable Court for a Writ of Certiorari to review the judgment of the Third Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (App. A at 1a) is reported at 283 F.3d 561 (3rd Cir. 2002). The opinion of the U.S. District Court, Middle District of Pennsylvania is reported at 91 F.Supp.2d 788 (M.D. Pa. 2000).

STATEMENT OF JURISDICTION

On March 29, 2000, the U.S. District Court, Middle District of Pennsylvania entered an order dismissing Respondent's claim for lack of standing. On March 18, 2002, the Third Circuit Court of Appeals reversed the District Court and remanded the case for further proceedings. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the Circuit Court's order.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The anti-retaliation provision of the ADA, 42 U.S.C. §12203(a) provides:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in

any manner in an investigation, proceeding, or hearing under this chapter.

In addition, 42 U.S.C. 12203(b) provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

Finally, The National Labor Relations Act of 1935, 29 U.S.C. 158(a)(1) provides in pertinent part:

> It shall be an unlawful labor practice for an employer -
>
> > (1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in §157 of this Title.

STATEMENT OF THE CASE

Petitioner, Mercy Hospital Inc. operates Mercy Hospital in Wilkes-Barre, Pennsylvania. Respondent, Gregory Fogleman was employed at Mercy from 1978 until 1996.

Respondent's father, Sterril Fogleman, who was also employed at Mercy, filed a complaint with the Equal Employment Opportunity Commission in 1994, alleging age discrimination in violation of the Age Discrimination in Employment Act, (ADEA), 29 U.S.C. 621 et seq, and also alleging violations of the Americans with Disabilities Act

(ADA). Respondent did not participate in any way in these proceedings.

On September 17, 1996, Respondent was terminated from his position pursuant to an incident on September 6, 1996. Mercy claims Respondent was terminated for cause. Respondent claims he was terminated because of his father's suit against Mercy. Respondent afterwards sued Mercy under the ADA, the ADEA and the Pennsylvania Human Relations Act (PHRA), alleging illegal retaliation for his father's various claims.

This United States District Court for the Middle District of Pennsylvania, McClure, J. presiding, dismissed Respondent's claim. The court held that since Respondent had not participated in his father's proceedings in any manner, that he did not have standing to sue. The court further dismissed Respondent's claim that, regardless of whether he actually participated in his father's proceedings, he should nonetheless be granted standing to sue because Mercy perceived him to be participating.

The Third Circuit Court of Appeals, Becker, CJ., Nygaard, J. and Reavley, J.,[1] presiding, reversed the District Court. It held that the interpretation given to 29 U.S.C. 158(a)(1) of the National Labor Relations Act of 1935 (NLRA) should be extended to the interpretation of the anti-retaliation provisions of the ADA. To that end, Respondent has automatic standing to sue as the c lose relative of person exercising their rights under the ADA. The court further held that Respondent's perception theory of retaliation was valid, and that if Respondent could show that he was perceived to be

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[1] Sitting by designation.

participating in his father's proceedings, he would have standing to sue for alleged retaliation.

Mercy has filed this timely Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

I The decision of the Third Circuit Court of Appeals is contrary to the plain language of the ADA and the intent of the ADA as envisioned by Congress.

It is well settled, that in order to have standing to raise a claim for unlawful retaliation under the ADA, you must show that (1) you engaged in statutorily protected activity, (2) you suffered an adverse employment action, and (3) there was a causal link between the adverse employment action and the protected activity. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3rd Cir. 2000); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 201 (3rd Cir. 1994); Jalil v. Avdel Corp., 873 F.2d 701, 708 (3rd Cir. 1989); Endres v. Techneglas, Inc., 139 F.Supp.2d 624, 636 (M.D. Pa. 2001).

The plain language of the ADA also states that the person who engages in the protected activity need not be the person who actually had brought the ADA claim originally. If a person actively opposes discrimination or in any way participates in the ADA claim of another (e.g. giving testimony, acting as a witness) and the employer retaliates against that person, that person will have standing to sue. 42 U.S.C. 12203(a)[2]

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[2] Other anti-discrimination statutes contain very similar language. Section 955(d) of the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. §955(d), prohibits discrimination against an

Much different is the situation where the person allegedly retaliated against has done nothing to oppose the employer's discrimination and has not participated in the ADA claim of another in any way. Here, at least two Circuits, based on the statutory language, have held that the person does not have standing. See Holt v. JTM Industries, Inc., 89 F.3d 1224 (5th Cir. 1996); Smith v. Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998).

In holding that the Respondent in the present case had standing under the ADA, the Third Circuit applied a two-step analysis. First, it scrutinized the Plaintiff's claim for automatic standing under §12203(a) of the ADA. It held that:

> "The plain text of the anti-retaliation provisions requires that the person retaliated against also be the person who engaged in the protected activity: Each statute forbids discrimination against an individual because

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individual who "has opposed any practice forbidden by the Act, or because such individual has made a charge, testified or assisted in any manner in any investigation, proceeding or hearing under this Act." Section 623(d) of the ADEA, 29 U.S.C. §623(d), prevents discrimination against any individual who "has opposed any practice made unlawful by this section or because such individual, member or applicant for membership has made a charge, testified assisted or participated in any manner in any investigation, proceeding or litigation under this chapter." Finally, section 2000(e)(3)(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)(3)(a), prohibits discrimination against an individual "because he is opposed to any practice, made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted or participated in any manner in any investigation, proceeding or hearing under this subchapter.

> 'such individual' has engaged in protected conduct. By their own terms then, the statutes do not make actionable discrimination against an employee who has not engaged in protected activity. Read literally, the statutes are unambiguous – indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity."

Fogleman v. Mercy Hospital Inc., 283 F.3d 561, 568 (3rd Cir. 2002)

The court, in dictum, opined that the plain language of the statute was seemingly at odds with what the court saw as the underlying policy objectives of the ADA itself, but ultimately recognized that apparent discrepancies between policy objectives and plain language must be resolved in favor of the plain language. Id, citing Caminetti v. United States, 242 U.S. 470, 485 (U.S. 1917).

The court further announced that "there are cases in which a blind adherence to the literal meaning of a statute would lead to a patently absurd result that no rational legislature could have intended." Fogleman, 283 F.3d at 569. However, the court held that this was not such a case. Id. It cited several possible explanations why Congress would wish to limit standing in ADA claims. For example, the court stated that Congress could have feared that extending standing beyond those who had actually engaged in protected activity would "open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees." Id at 570.

Second, the Third Circuit turned its attention to §12203(b) of the statute, which it stated "arguably sweeps broader than §12203(a)." Id, citing Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 789 (3rd Cir. 1998). It drew a comparison between the anti-retaliation provisions of §158(a)(1) of the National Labor Relations Act (NLRA), and the anti-retaliation provision of the ADA. The court concluded that it would be "sensible" to interpret the two provisions similarly. Fogleman, 283 F.3d at 570. To that end, it cited Kenrich Petrochemicals Inc. v. NLRB, 907 F.2d 400 (3rd Cir. 1990), where it held that an individual who suffers retaliatory action as a result of family members' unionization does have standing regardless of whether or not the person retaliated against actually participated in or encouraged the decision to unionize.

Applying this reasoning, the Third Circuit reversed the District Court, and held that §12203(b) should be interpreted to grant standing to an individual who has never participated in an ADA proceeding. Fogleman, 283 F.3d at 570-571.

The Third Circuit then turned to Respondent's perception theory of retaliation. As the District Court pointed out, the plain statutory language does not explicitly support such a theory. Fogleman, 91 F.Supp.2d at 796. While the language does not explicitly reject such an idea, it remains that any interpretation which would recognize such a theory would represent an extension of the statutory language.

Mercy submits that this holding was error. A third party retaliation claim under §12203(b) by one who was not exercising his own rights, or assisting another in the exercise of their rights, would entirely negate the limiting language of §12203(a) which allows third party retaliation claims only by an individual who "has opposed any act or practice made

unlawful by this chapter or because such individual has made a charge, testified or assisted or participated in any manner in any investigation, proceeding or hearing under this chapter. Prior to being fired, Respondent did not oppose any act or practice made unlawful by the ADA and did not participate in any ADA proceeding. The District Court and Court of Appeals were both correct in determining that Respondent did not have standing under §12203(a). Allowing him to have standing under §12203(b) when he does not meet the requirements of §12203(a), would completely negate the language, meaning and significance of that section.

In addition, the Decision of the Court of Appeals is contrary to the plain language of §12203(b). While §12203(b) may be broader than §12203(a) because it still limits its effects to individuals who are exercising rights under the ADA or assisting others who are so exercising rights. At the time he was terminated, Greg Fogelman did not fall into that category and, therefore, should not be granted standing to sue under either §12203(a) or (b).

Respondent alleges he was terminated because of his father's exercise of ADA rights. Perhaps §12203(b) would have given his father an additional cause of action on the theory that the termination of Greg constituted an attempt to coerce, intimidate or threaten Sterril. This issue, however, was not before the District Court or Court of Appeals as Sterril Fogelman, who was certainly aware of Respondent's termination, and was represented by the same counsel, obviously chose not to pursue a claim under §12203(b).

Moreover, neither §12203(a) or §12203(b) contain any language indicating an intent to grant standing to one who is perceived to have participated in another's assertion of ADA rights. Indeed, if Congress wanted to include those who were

merely perceived to oppose or participate in an ADA proceeding, it certainly could have done so easily by inserting the phrase "or is perceived to be" in the language. Nowhere does such language appear.

The Court of Appeals justified its' Decision on the basis of Kenrich Petrochemicals, Inc. v NLRB, a case involving an interpretation of the National Labor Relations Act. Kenrich's seven clerical workers decided to form a union. Shortly after receiving notice of the fact Kenrich fired Helen Chizmar, the clerical employee's Supervisor, who also happened to be related to three of the employees. As a Supervisor, Chizmar was not a member of the Bargaining unit formed by the clerical employees.

The clerical employees union instituted an unfair labor practice proceeding before the National Relations Board. The union alleged that the firing of Chizmar constituted coercion of the clerical employees in the exercise of their rights under the National Labor Relations Act. Subsequently, both the NLRB and the Third Circuit held that the firing of Chizmar interfered with the clerical workers rights to engage in a protected activity and, therefore, constituted a §158(a)(1) unfair labor practice even though Chizmar was not a member of the bargaining unit.

The legislative history of both the NLRA and the ADA suggests that the two were intended to solve different problems and were to be enjoyed by different classes of individuals. The NLRA was designed to encourage unionization and to remove historical roadblocks that employers erected to prevent such unionization. 29 U.S.C. 151. Among these roadblocks was the use of intimidation, whereby an employer would threaten or execute adverse employment action against the person or a member of his

family (should they share employment) in order to dissuade the attempt at unionization. Harden. Developing Labor Law. Vol. I. Pg. 26. Given these goals, Congress drafted broad statutory language, and did not limit the protections of the NLRA to a particular class of people.

The legislative history of the ADA is much different, as are its goals. It is the progeny of the Rehabilitation Act (RHA) of 1973. 29 U.S.C. 701. The RHA was drafted so that "no otherwise qualified handicapped individual...shall solely by reason of his handicap be excluded from participation and cannot be denied the benefits of or be subject to discrimination under any program activity receiving federal financial assistance." 29 U.S.C. §793.

It is important to note that in the seventeen years that elapsed between the passage of the RHA and the passage of the ADA, there is no substantial case law that suggests there was widespread retaliation against those who brought claims under the RHA. Furthermore, Congress conducted hearings for two years prior to the passage of the ADA, and did not conclude that any widespread retaliation or coercion existed with respect to the RHA. Finally, where Congress had intended to encourage unionization when it drafted the NLRA, it cannot be said that it desired to "encourage" claims under the ADA.[3]

Given this fact, it is not surprising that Congress drafted language that limits the class of people who can

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[3] Certainly it would be an odd argument to suggest that Congress, in adopting the ADA, intended to encourage people to become disabled in some way so that they might bring claims under the ADA.

validly bring a claim under the ADA and makes no provision to those who were perceived to be disabled. Specifically, §12203(a) states that it shall be unlawful to "discriminate against any individual because *such individual* has opposed any act or practice made unlawful by this chapter, because *such individual* made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. §12203(a). Furthermore, §12203(b) prohibits coercion , interference, and intimidation, but does not explicitly extend standing any further than does §12203(a). Indeed, like §12203(a), §12203(b) expressly limits its coverage to those exercising their own ADA rights or those aiding or encouraging another in the exercise of their rights. Thus, both the legislative history and the plain language of the ADA indicate that it should not be interpreted in the broad manner that the Third Circuit interpreted the NLRA in the Kenrich Petrochemicals, Inc. case.

Mercy submits, therefore, that the Opinion of the Court of Appeals granting standing to Respondent to purse this claim in this case, is inconsistent and contrary to both the legislative intent of the ADA and the plain language contained therein.

II The decision of the Third Circuit Court of Appeals is in direct conflict with the decisions of the Fifth Circuit and the Eighth Circuit, and there continues to be discord among the other Circuits on the issue of automatic standing under the Americans with Disabilities Act.

Mercy also submits that the Decision of the Court of Appeals is in direct conflict with the Decision of the 5th and 8th Circuits reflecting discord among the Circuits on the issue of

automatic standing under the Americans with Disabilities Act and other Civil Rights laws.

The 5th Circuit considered the automatic standing issue in Holt v JTM Industries, Inc., supra, an ADEA case. Linda and Frank filed Complaints against JTM alleging, inter alia, retaliation against Frank for Linda's administrative complaint of age discrimination. A jury returned a verdict in favor of Frank against JTM. JTM filed an appeal to the Court of Appeals.

The court noted that the evidence did not establish any participation by Frank in Linda's protected activities and reversed the jury verdict in his favor. The court relied on the plain language of Section 623(d) which required opposition or participation in the preceding as a prerequisite for standing to sue. The court specifically rejected the argument that a spouse or other close relative should have an automatic right to sue in such cases because "such a rule would contradict the plain language of the statute." Holt v. JTM Industries, Inc., 89 F.3d at 1226.

The 8th Circuit considered the issue in Smith v Riceland Foods, Inc., a case decided under Title VII. Thomas and his significant other, Smith were employed by Riceland Foods. Thomas claimed that he had been retaliated against by Riceland Foods because Smith had file a claim of discrimination against the company. The Court noted that the record contained no evidence that Riceland knew that Thomas had helped Smith file her charge of discrimination and, therefore, a jury could not have found a causal connection between his assistance to Smith and the termination of his employment. The Court held:

> This Court's decision on retaliation claims have consistently held that, in order to establish a prima facie case of discrimination, the employee must have engaged in statutorily protected activity. We believe that the rule advocated by Thomas - that a plaintiff bringing a retaliation claim need not have personally engaged in statutorily protected activity if his or her spouse - or significant other who works for the same employer, has done so, is - neither supported by the plain language of Title VII nor necessary to protect third parties such as spouses or significant others from retaliation. Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for assisting or participating in any manner in any proceeding under Title VII. Accordingly, we hold that plaintiff bringing a retaliation claim under Title VII must establish that he personally engaged in the protected conduct. 151 Fd. 3rd at 819 (citations omitted)

Holt v JTM Industries, Inc., and Smith v Riceland Foods, Inc. involved the ADEA and Title VII rather than the ADA. All three of these statutes, however, contain very similar, if not identical, language limiting standing to those who were exercising their own rights or those who were assisting others in the exercise of their rights. Thus, the decisions of the Court of Appeals in this case to allow Respondent to pursue this claim when he was not exercising his own rights and not assisting his father in the exercise of his rights, appear to be in direct conflict with the Holt v JTM Industries, Inc., and Smith v Riceland Foods, Inc. cases.

III The decision of the Third Circuit is contrary to decisions of this Court, which have expressly limited standing under the Americans with Disabilities Act.

In recent cases, this Court has limited who is considered a "disabled person" under the ADA. See Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 US 184 (U.S. 2002)(holding that individual with carpal tunnel syndrome was not disabled under the ADA); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (U.S. 1999)(holding that individual with high blood pressure was not disabled under ADA); Sutton v. United Airlines, Inc., 527 U.S. 471 (U.S. 1999)(holding that individual with myopia were not disabled under the ADA). Chevron U.S.A. v. Echazabal, 2002 WL 1270586 (U.S. 2002)(holding that no claim under the ADA exists where the disabled person themselves would be put in danger were they permitted to work in a given position). It was therefore illogical for the Third Circuit to expand the standing of wholly peripheral, non-handicapped individuals in the face of binding Supreme Court precedent limiting who is a "disabled person" to begin with.

IV The decision of the Third Circuit is contrary to sound public policy considerations.

Finally, an automatic standing rule and especially a perception theory of retaliation liability would not only create automatic standing, but would create automatic questions of fact. The only way to determine subjective intent with any certainty is through witness testimony. Credibility of witnesses is a question solely for the trier of fact. Winarto v. Toshiba American Electronics Components, Inc., 274 F.3d 1276 (9th Cir. 2001). Therefore, full jury trials would be needed every time an individual's *subjective* "feelings" about

the alleged *subjective* intent of an employer led the individual to *subjectively* conclude that the *subjective* intent of an employer was to retaliate. This pervasive subjectivity would create a legal and factual quagmire which would clog the court system and impede the free flow of justice.

Such a rule would also effectively paralyze an employer who has been charged with ADA violations, regardless of those charges' merits. For the entire duration of the proceedings, the employer would be unable to exercise its otherwise absolute right to terminate at-will employees for fear it could be haled into court for having perceived that employee to oppose or participate in the ADA proceedings.[4] This could extend to the entirety of an employer's workforce. In addition to the firing of close family members, the firing of a close friend or a distant relative with whom one is very close could certainly have a coercive effect if done for improper reasons. Employers with smaller workforces or who employ a majority of residents in a given area are likely to face a workforce where there are close ties amongst the employees, spanning every possible familial relationship and potentially including friends, neighbors, and parishioners. Respondent in the instant action proposes no bright line and no bright line is apparent from a reading of the case law. Adopting Respondent's perception theory (and his automatic standing claim as well) could, through fear of litigation, prevent an employer from taking any action against the majority of his workforce - even for cause - every time an

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[4] Indeed, the Third Circuit in Fogleman stated that this could have been the reason Congress used limiting language in drafting the anti-retaliation provisions of the ADA. Fogleman, 283 F.3d at 570.

employee brought an ADA claim. This was certainly not what Congress intended.

CONCLUSION

Mercy submits, therefore, that the issues presented in this case constitute sufficient grounds for the Supreme Court to grant Certiorari. The Decision of the Court of Appeals was contrary to the statutory language and the intent of Congress reflected in its' legislative history. The Decision is in conflict with Decisions of the 5th and 8th Circuit as well as other Decisions of the Supreme Court itself. Furthermore, the Decision of the Court of Appeals was contrary to sound public policy considerations. Thus, Mercy requests that the Court grant Certiorari in this important case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2263

[Filed: March 18, 2002]

Argued: July 10, 2001

GREGORY FOGLEMAN,)
Appellant)
)
v.)
)
MERCY HOSPITAL, INC.)
)

On Appeal From the United States District Court
For the Middle District of Pennsylvania
[D.C. Civ. No. 98-cv-01746]
District Judge: Honorable James F. McClure Jr.

Before: BECKER, *Chief Judge,* NYGAARD, and REAVLEY
Circuit Judges

OPINION OF THE COURT

BECKER, Chief Judge.

This employment discrimination action is presented as a modem rendition of the age-old parable of a son being punished for the sins of his father.[1] The father, Sterril Fogleman, had been an employee of defendant Mercy Hospital, Inc. ("Mercy") for seventeen years before leaving the hospital in 1993. In an action separate from this case, Sterril sued Mercy claiming that he had been forced out of his job due to age and disability discrimination. Sterril's son Greg Fogleman, who is the plaintiff in the case at bar, also worked for Mercy, being employed as a security guard for eighteen years before his termination in 1996. Although Mercy claims to have fired Greg for valid job-related reasons, Greg asserts that these reasons were pretextual, and that the real reasons for his firing relate to his father's legal action against Mercy.

Greg sued Mercy under the anti-retaliation provisions of three civil rights laws: the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 62 1-634; and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. §§ 951-963, alleging three theories of illegal retaliation. Greg's first theory of illegal discrimination is that he was fired in retaliation for his father's having sued Mercy

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[1] See. e.g.. Euripides, Phrixus, frag. 970 ([T]he gods visit the sins of the fathers upon the children."); Horace. Odes 111, 6:1 ("For the sins of your fathers you, though guiltless, must suffer."); William Shakespeare. The Merchant of Venice, act Ill. sc. 5, line 1 ([T]he sins of the father are to be laid upon the children.").

for disability and age discrimination. Second, Greg claims that Mercy violated the anti-discrimination laws by terminating him because it thought that he was assisting his father with his lawsuit (even if, in actuality, he was not). Third, Greg alleges that he was fired for refusing to cooperate with Mercy in the investigation of his father's claim. The District Court granted summary judgment to Mercy on all of Greg's claims, concluding that none of his theories of illegal retaliation were supported by the language of the ADA, ADEA or PHRA.

In reviewing the District Court's grant of summary judgment with respect to Greg's first claim, we are called upon to determine whether the anti-retaliation provisions of the ADA, ADEA, and PHRA prohibit an employer from taking adverse employment action against a third party in retaliation for another's protected activity. The ADA, ADEA, and PHRA contain nearly identical anti-retaliation provisions that prohibit discrimination against any individual because "such Individual" has engaged in protected activity. 42 U.S.C. § 12203(a); 29 U.S.C. § 623(d); 43 Pa. Cons. Stat. §955(d). Although we recognize that allowing an employer to retaliate against a third party with Impunity can Interfere with the overall purpose of the anti-discrimination laws, we believe that by referring to "such individual," the plain text of these statutes clearly prohibits only retaliation against the actual person who engaged in protected activity.

Unlike the ADEA and PHRA, however, the ADA contains an additional anti-retaliation provision that makes it unlawful for an employer "to coerce, intimidate, threaten, or interfere with any individual" exercising rights protected under the Act. 42 U.S.C. § 12203(b). We conclude that under

this provision, which4 contains language similar to that of a section of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), that we have interpreted as recognizing third-party retaliation claims, Greg's claim that he was retaliated against for his father's protected activity is valid as a matter of law, and we will therefore reverse the grant of summary judgment.

We also believe that Greg's perception theory of illegal retaliation — that he was fired because Mercy thought that he was engaged in protected activity, even if he actually was not — presents a valid legal claim. Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable. Accordingly, we will reverse the Court's grant of summary judgment on Greg's perception claim of retaliation. We discuss these first two theories in the text, infra. Greg's other theory of illegal retaliation — that he was fired for refusing to cooperate with Mercy in the investigation of his father's claim — is plainly without merit and we dispose of it in the margin.[2]

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[2] Greg alleges that Mercy's Vice President for Support Services, Michael Elias, called him into his office at least six limes to inquire about the state of Sterril's claim. In response to Elias's entreaties, Greg repeatedly responded that he had not discussed the case with his father, and that even if he had, he would not discuss the matter with Elias. while an employee's refusal to cooperate with management's investigation of a claim filed by another employee may constitute protected activity under the anti-discrimination laws,

I. Facts and Procedural History

Members of the Fogleman family have a long history of employment at Mercy Hospital. The plaintiff, Greg Fogleman, began working for Mercy as a security officer in 1978. In 1992 Mercy named him Supervisor of Security, a post he held until his termination in 1996. Greg's wife, Michelle, also worked for Mercy for a few years in the late 1980s and early 1990s, and Greg's mother was an employee at Mercy until her retirement in May 1999. But the story of this litigation begins with Greg's father, Sterril Fogleman, who began working at Mercy in 1976 as an engineer and remained on the staff for 17 years, until 1993, when the hospital offered him a choice between accepting a demotion or leaving the hospital. Sterril chose to leave, and suspected that Mercy had pushed him out due to his advancing age and his recent loss of sight in one eye.

In June 1995, after satisfying the administrative prerequisites, Sterril sued Mercy for illegal discrimination in the District Court for the Middle District of Pennsylvania.

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see 2 Employment Discrimination § 34.02121 (La K. Larson ed., 2d ed. 2001). We do not think that Greg's remarks amounted to a refusal to cooperate. Greg's response that he did not discuss" the case with his father indicated only that he had no information to provide the hospital. This Is not a case, therefore, in which an employee refused to share knowledge of a fellow employee's claim with his employer. Although Greg claims to have also told Elias that even If he had discussed the claim with his father, he would not be willing to share the information, we consider this remark gratuitous in light of Greg's own admission that he had not broached the issue with his father.

Just before trial was to begin, in July 1998, the parties settled and the case was dismissed. Greg asserts that he did not participate in any way in Sterril's complaints or lawsuit.

Shortly after Sterril filed his lawsuit in federal court, Martin Everhart, Mercy's Vice President of Human Resources, circulated a one-page memorandum to top Mercy officials offering a brief explanation of why, in the hospital's opinion, Sterril's claim was meritless. The memo acknowledged that commenting on Sterril's lawsuit during its pendency was "done at some risk as we continue to have relatives of Mr. Fogleman employed by Mercy and open ourselves up to further public exposure particularly through newspapers as this document may be shared that way." Greg submits that this language Indicates that Mercy considered him a "risk" because of his father's lawsuit. He also asserts that Everhart was "a bit colder" to him after the circulation of this memo. As described in note 2, supra, Greg also avers that a representative of management —namely, Michael Elias — repeatedly questioned him about the status of his father's lawsuit in an attempt to pry information out of him to aid the hospital in its defense.

On September 6, 1996, Greg was involved in an incident at the hospital's gift shop that ultimately provided the official — Greg claims pretextual — basis for Mercy's termination of his employment. Greg claims that he used a spare key to enter the hospital gift shop that morning to check on the well-being of an elderly woman, Audrey Oeller, who worked there as a volunteer. Greg avers that his job description authorized him to enter the shop; additionally, his supervisor testified that before this incident Greg routinely entered the shop to check on Oeller.

The hospital, in contrast, asserts that Greg had no authority to enter the gift shop at any time, and that his entry was in violation of hospital rules. Moreover, the hospital represents that it was troubled by Oeller's conflicting account of Greg's reasons for entering the shop. According to Oeller, Greg told her that he entered the shop to check on the sprinkler system at the request of maintenance supervisor Dave Searfoss. Searfoss, however, related to the hospital that he had never made any such request of Greg. According to Mercy, Greg also violated hospital policy by failing to report the incident to anyone until questioned about It, failing to request assistance, failing to document the incident until directed to do so, and falling to report the taking of the key to the gift shop from a secure Maintenance Department Room.

On September 11, the hospital suspended Greg with pay in the wake of the gift shop incident pending further investigation. Greg claims that he was told that he would not receive a final determination on his employment status until September 17, which was also the same day that his father was to be deposed for his federal lawsuit against Mercy. Although it appears that no actual investigation took place before September 17, Greg was fired on that day, allegedly for reasons related to the gift shop incident. Greg avers that his termination was in violation of the hospital's progressive discipline policy. Other employees, Greg contends, were punished less severely for far more egregious infractions.

Greg sued Mercy in the District Court for the Middle District of Pennsylvania alleging violations of the ADA, the ADEA, and the PHRA. Mercy moved for summary judgment on these claims, and the District Court granted the motion, concluding that the statutes did not allow a plaintiff to sue on

the theory that he had suffered a discharge in retaliation for protected activity engaged in by another person, even if that other person was a close relative. The Court rejected Greg's alternative theories, concluding that they were unsupported by the statutory language. This timely appeal followed. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We set forth the familiar standard of review for grants of summary judgment in the margin.[3]

II. The Relevant AntiRetaliation Provisions

Greg alleges that his termination violated the anti-retaliation provisions of the ADA, the ADEA, and the PHRA. The ADA's anti-retaliation provision states:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 12203(a). The ADEA and PHRA contain nearly

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[3] Our review of a district court's grant of summary judgment is plenary. See Beers-Capitol v. Whetzel, 256 F.3d 120, 130 n.6 (3d Cir. 2001). Summary judgment is proper If there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. See F.R.C.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

identical anti-retaliation provisions, which we quote in the margin.

Because the anti-retaliation provisions of the ADA and ADEA are nearly identical, as is the anti-retaliation provision of Title VII, we have held that precedent interpreting any one of these statutes is equally relevant to interpretation of the others. See Krause v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997). The language of the PHRA is also substantially similar to these anti-retaliation provisions, and we have held that the PHRA is to be interpreted as identical to federal anti-discrimination laws except where there is something specifically different in its language requiring that it be treated differently. See Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996). There is no argument made by either party that the PHRA should be interpreted any differently from federal law in this case. For purposes of this appeal, therefore, we will interpret the anti-retaliation provisions of the ADA, ADEA, and PHRA cited above as applying identically in this case and governed by the same set of precedents.

In addition to the anti-retaliation provision cited above, the ADA has a further anti-retaliation provision not found in the ADEA and the PHRA. That provision reads:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise

> or enjoyment of, any right granted or protected by this chapter.

42 USC § 12203(b). As will appear, this provision, in light of its similarity to language in the NLRA, see 29 U.S.C. § 158(a)(1), is critical to the outcome of this case.

Before analyzing each of Greg's theories of illegal discrimination, we note that in order to establish a prima facie case of illegal retaliation under the anti-discrimination statutes, a plaintiff must show: 11) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." Krause, 126 F.3d at 500. Because the District Court concluded that Greg failed to satisfy the first prong with respect to his theories of relief, it never addressed the adverse employment action and causation prongs of his retaliation claims. Consequently, we do not address those issues here on appeal in the first instance. Rather, we consider only the District Court's treatment of the "protected activity" prongs of Greg's anti-discrimination claims.

III. Greg's Third-Party Retaliation Claim

In arguing that Mercy unlawfully retaliated against Greg for the protected activity of his father, Greg maintains that as a matter of statutory construction, the anti-retaliation provisions are violated even if the person retaliated against did not himself engage in protected conduct. The Equal Employment Opportunity Commission ("EEOC") has filed an

amicus brief in support of this position. Mercy responds that the anti-retaliation provisions only prohibit retaliation against a person who himself engaged in protected activity.

A.

In determining whether retaliation against a person who has not himself engaged in protected conduct is actionable, we first consider the ADA, 42 U.S.C. § 12203(a), ADEA,, 29 U.S.C. § 623(d), and PHRA, 43 Pa. Cons. Stat. § 955(d), each of which contains similar language prohibiting retaliation. We have yet to decide squarely whether these provisions make actionable retaliation against someone who has not himself engaged in protected conduct. Among the other courts that have addressed the issue no consensus has emerged. Some courts have answered the question definitively in the negative — i.e., a plaintiff may not present an anti-retaliation claim without personally participating in protected activity. See, e.g., Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998); Holt v. JTM Indus., Inc., 89 F.3d 1224, 1227 (5th Cir. 1996). But other courts have expressly acknowledged the viability of third-party retaliation claims. See, e.g., EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1212 (E.D. Cal. 1998); DeMedina v. Reinhardt, 444 F. Supp. 573, 580 (D.D.C. 1978).

The plain text of the anti-retaliation provisions requires that the person retaliated against also be the person who engaged in the protected activity: Each statute forbids discrimination against an individual because "such Individual" has engaged in protected conduct. By their own terms, then, the statutes do not make actionable discrimination against an employee who has not engaged in protected activity. Read

literally, the statutes are unambiguous — indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity. Furthermore, although there is no Third Circuit opinion squarely deciding the issue, the language of our opinions has at times reflected this literal understanding of the statute. For instance, in Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173 (3d Cir. 1997), we stated that "[fin order to establish a prima facie case of discriminatory retaliation, . . . [the plaintiff] must show that she engaged in protected activity. . . ." Id. at 177 (emphasis added).

Nevertheless, Greg and the EEOC are correct that a literal reading of the anti-retaliation provisions is at odds with the policies animating those provisions. The anti-retaliation provisions recognize that enforcement of anti-discrimination laws depends in large part on employees to initiate administrative and judicial proceedings, There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights. Indeed, as the Seventh Circuit sagely observed, 'To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088 (7th Cir. 1987). Allowing employers to retaliate via friends and family, therefore, would appear to be in significant tension with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of discriminatory conduct in the workplace. See DeMedina, 444 F. Supp. at 580 (concluding that "tolerance

of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their rights under Title VII").

This case, therefore, presents a conflict between a statute's plain meaning and its general policy objectives. In general, this conflict ought to be resolved in favor of the statute's plain meaning. See Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain the sole function of the courts is to enforce it according to its terms."). The preference for plain meaning is based on the constitutional separation of powers — Congress makes the law and the judiciary interprets it. In doing so we generally assume that the best evidence of Congress's intent is what it says in the texts of the statutes. See 2A Norman J. Singer, Statutes and Statutory Construction 135, § 46:03 (6th ed. 2000).

To be sure, however, there are cases in which a blind adherence to the literal meaning of a statute would lead to a patently absurd result that no rational legislature could have intended. Following the letter, rather than the spirit, of the law in such cases would go against the court's role of construing statutes to effectuate the legislature's intent. See United States v. Schneider, 14 F.3d 876, 880 (3d Cir. 1994) ("It is the obligation of the court to construe a statute to avoid absurd results, if alternative interpretations are available and consistent with the legislative purpose."). We do not believe, however, that this is such a case. Although we think, as explained above, that recognizing third-party retaliation claims is more consistent with the purpose of the anti-

discrimination statutes, we cannot say that prohibiting such claims is an absurd outcome that contravenes the clearly expressed intent of the legislature. See In re Pelkowski, 990 F.2d 737, 741 (3d Cir. 1993) ("In the absence of clearly expressed contrary legislative intent, the statutory language must be regarded as conclusive."). Rather, while we do not find them particularly convincing, there are at least plausible policy reasons why Congress might have intended to exclude third-party retaliation claims.

For instance, Congress may have thought that "[[i]n] most cases, the relatives and Mends who are at risk for retaliation will have participated in some manner in a co-worker's charge of discrimination," thereby having themselves engaged in protected activity. Halt. 89 F.3d at 1227. If this is true, then the occurrence of pure third-party retaliation will be rare, so that not allowing claims to proceed in these few instances would not necessarily "defeat the plain purpose" of the anti-discrimination laws. Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983). Put differently, barring third-party retaliation claims will not render the anti-retaliation provisions completely meaningless, since they still prohibit the practice of retaliating against an employee for the employee's own protected activity, which may be the most common form of retaliation.

Moreover, Congress may have feared that expanding the class of potential anti-discrimination plaintiffs beyond those who have engaged in protected activity to include anyone whose friends or relatives have engaged in protected activity would open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees. In light of these plausible explanations for

excluding third party retaliation claims, we cannot say that adherence to the statute's plain text would be absurd, and we therefore conclude that the District Court was correct to reject as a matter of law Greg's third-party retaliation claims brought under the ADEA, the PHRA, and the first anti-retaliation provision of the ADA, 42 U.S.C. § 12203(a).

B.

As an alternative basis for his third-party claim Greg also relies on the second anti-retaliation provision of the ADA, 42 U.S.C. § 12203(b), which reads:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

We have noted that the scope of this second anti-retaliation provision of the ADA "arguably sweeps more broadly" than the first. Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 789 (3d Cir. 1998). In particular, unlike the first provision, the text of this provision does not expressly limit a cause of action to the particular employee that engaged in protected activity. This provision contains language similar to that found in section 8(a)(l) of the NLRA, 29 U.S.C. § 158(a)(l), which makes It an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in exercising their rights guaranteed under the Act. In Kenrich Petrochemicals, Inc. v.

NLRB, 907 F.2d 400 (3d CIR. 1990) (in banc), we enforced an order of the National Labor Relations Board that interpreted section 8(a)(1) to prohibit an employer's retaliation against a supervisory employee (who was otherwise unprotected by the Act) for protected activity engaged in by her close relatives. We noted that the firing of a close relative could have a "coercive" effect on the employees engaging in protected activity, id. at 407, instilling "fear that the exercise of their rights will give the company a license to inflict harm on their family." Id. at 409. Our sister courts of appeals have also recognized that section 8(a)(1) prohibits the firing of a close relative of an employee who engages in activity protected by the NLRA. See, e.g., Tasty Baking Co. v. NLRB, 254 F.3d 114, 127-28 (D.C. Cir. 2001); NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088-89 (7th Cir. 1987).

Our interpretations of the NLRA can serve as a useful guide to interpreting similar language in the ADA, as both are "part of a wider statutory scheme to protect employees in the workplace nationwide." McKennon v. Nashville Banner Pub'g Co., 513 U.S. 352, 357 (1995). The texts of section 8(a)(1) of the NLRA and the ADA's second anti-retaliation provision are essentially similar — each makes it illegal for an employer to "coerce" or "interfere with" an employee exercising his rights under the act. In view of this fact, as well as the similar policies underlying the two provisions, it seems sensible to hold, as we now do, that Greg may assert his third-party retaliation claim under this section of the ADA just

as he would be able to do under the NLRA.[4] Accordingly, we will reverse the District Court's order granting summary judgment to Mercy to the extent that it was based on the Court's view that Greg's third-party retaliation claim was not cognizable under the ADA's second anti-retaliation provision. As noted above, because the District Court did not address the second and third prongs of Greg's retaliation claim — adverse employment action and causation — we do not do so on appeal.

IV. Greg's "Perception Theory" of Retaliation

As a final means of showing illegal retaliation under the anti-discrimination statutes, Greg argues that even if he was not engaged in primary protected activity, Mercy perceived him to be so engaged. Greg contends that Mercy fired him with the subjective intent of retaliating against him

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[4] We recognize that the ADA's second anti-retaliation provision makes it unlawful "to coerce . . . any individual" whereas section 8(a)((1) of the NLRA makes it unlawful to "coerce employees." One could read the reference to "any individual" as limiting causes of action to those individuals who have themselves engaged in protected activity under the ADA in a way that the NLRA's reference to "employees" does not. we do not take such a view, however, for we believe that the shared language of the two provisions — the prohibition on an employer "coerc[ing]" or "interfer[ing] with" protected activity — provides the basis for allowing third party claims. This Is so because action taken against the third party employee can have the effect of coercing the employee engaging in protected activity, and may also coerce other employees of the company from engaging in protected activity in the future.

for engaging in protected activity, thereby violating the anti-retaliation provisions. The District Court disposed of this claim as a matter of law, concluding that the statutory language did not support a perception theory of retaliation. We disagree.

Unlike the interpretation of "such individual" to allow for third party claims advocated by Greg that we rejected in Section II.A, we do not believe that the perception theory contradicts the plain text of the anti-discrimination statutes. Rather, we read the statutes as directly supporting a perception theory of discrimination due to the fact that they make it illegal for an employer to "discriminate against any individual because such individual has [engaged in protected activity.]" 42 U.S.C. § 12203(a) (emphases added). "Discriminat[ion]" refers to the practice of making a decision based on a certain criterion, and therefore focuses on the decisionmaker's subjective intent. What follows, the word "because," specifies the criterion that the employer is prohibited from using as a basis for decisionmaking. The laws, therefore, focus on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus are actually correct as a factual matter.

As an illustration by analogy, imagine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim. What is relevant is that the applicant, whether Muslim or not, was treated worse than he otherwise would have been for reasons prohibited by the statute. We have

adopted this same approach in the labor law context, where we have consistently held that an employer's discharge of an employee for discriminatory reasons amounts to illegal retaliation even If It Is based on the employer's mistaken belief that the employee engaged in protected activity. See Fogarty v. Boles, 121 F.3d 886, 891 (3d Cir. 1997); Brock v. Richardson, 812 F.2d 121, 125 (3d Cir. 1987). Accordingly, we hold that If Greg can show, as he claims, that adverse action was taken against him because Mercy thought that he was assisting his father and thereby engaging in protected activity, it does not matter whether Mercy's perception was factually correct.

As evidence of the hospital's perception that he was engaged in protected activity, Greg relies, inter alia, on the circulation of Everhart's memo, Everhart's somewhat "colder" demeanor toward him after the memo's circulation, Elias's repeated questioning, and, of course, his termination, which he alleges was in violation of the hospital's progressive discipline policy. Because, however, the District Court did not in the first instance address the question of whether this evidence presented a triable issue of fact as to Mercy's perception of Greg having engaged in protected activity, we do not delve into it on appeal. Nor, as noted above, do we address the second and third prongs —adverse employment action and causation — of Greg's illegal retaliation claim. Rather, we hold only that the District Court erred in concluding that Greg's perception theory of illegal retaliation was invalid.

Conclusion

For the foregoing reasons, the order of the District Court granting summary judgment to Mercy will be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 4:98CV1746

Gregory Fogleman, Plaintiff)
v.)
Mercy Hospital, Inc., Defendant)

Judge McClure

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgement be and hereby is entered in favor od Defendant Mercy Hospital and against Plaintiff Gregory Fogleman with respect to Counts I-III of the Complaint.

MEMORANDUM OPINION

BACKGROUND

On October 26. 1998, plaintiff Gregory Fogleman commenced this action by filing a complaint alleging that his employment was terminated in violation of the Americans

with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq., the Pennsylvania Human Relations Act (PHRA), 43 Pa.Stat.Ann. §§ 951 et seq., and the Pennsylvania Wage Payment and Collection Act (PWPCA), 43 Pa.Stat.Ann. §§ 260.1 et seq. Counts I, II, and III of the complaint allege that the termination was in retaliation for a claim by Fogleman's father under the PHRA, ADA, and ADEA. respectively. Count IV is a claim under the PWPCA alleging that Mercy withheld wages and other compensation due at the time of the termination.

After an attempt at mediation between the parties failed, discovery was completed. Jury selection is scheduled for June 1, 2000, with trial to commence as soon as feasible thereafter.

Before the court is Mercy's motion for summary judgment.

DISCUSSION

I. STANDARD

A. Summary Judgment

Summary judgment is appropriate if the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."* Fed.R.Civ.P. 56(c) (emphasis added).

> ...[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party bears the initial responsibility of stating the basis for its motions and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Celotex at 323, 106 S.Ct. 2548. He or she can discharge that burden by "showing...that there is an absence of evidence to support the nonmoving party's case." Celotex at 325, 106 S.Ct. 2548.

Issues of fact are genuine "only if a reasonable jury, considering the evidence presented, could find for the non-moving party." Childers v. Joseph, 842 F.2d 689, 693-694 (3d Cir.1988) (citing Anderson v. Liberty Lobby, Inc., 477

U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Material facts are those which will affect the outcome of the trial under governing law. Anderson at 248, 106 S.Ct. 2505. The court may not weigh the evidence or make credibility determinations. Boyle v. County of Allegheny, 139 F.3d 386, 393 (3d Cir.1998). In determining whether an issue of material fact exists, the court must consider all evidence and inferences drawn therefrom in the light most favorable to the non-moving party. Boyle at 393; White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988).

If the moving party satisfies its burden of establishing a prima facie case for summary judgment, the opposing party must do more than raise some metaphysical doubt as to material facts, but must show sufficient evidence to support a jury verdict in its favor. Boyle at 393 (quoting, inter alia, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

B. Retaliation

In its brief in support of the motion for summary judgment, Mercy confines its argument to the claims of retaliation. Those claims are limited to Counts I, II, and III of the complaint, while Count IV relates to compensation allegedly not provided to Fogleman after the termination of his employment. Because no argument is made with respect to Count IV, we confine our consideration to the retaliation claims.

Because of the similarity in language, claims of retaliation under the ADEA, ADA, and PHRA follow the framework established for cases under Title VII of the Civil

Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-1 et seq. Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir.1997) (anti-retaliation provision of ADA similar to anti-retaliation provision of Title VII); Barber v. CSX Distribution Services, 68 F.3d 694, 698 (3d Cir. 1995) (provisions of ADEA similar in "text, tone, and purpose" of Title VII). See also Dici v. Commonwealth of Pennsylvania, 91 F.3d 542, 552 (3d Cir.1996) (PHRA applied in accordance with Title VII unless language of PHRA demonstrates otherwise). To establish a claim under any one of these provisions, the plaintiff must demonstrate that: (I) he or she engaged in protected activity under the relevant act; (2) there was an adverse employment action either after or contemporaneous with the protected activity; and (3) there is a causal connection between the protected activity and the adverse employment action. Krouse at 500; Barber at 701; Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir.) (PHRA claim analyzed under Title VII framework), cert. denied, 522 U.S. 914, 118 S.Ct. 299, 139 L.Ed.2d 230 (1997).

Mercy's first, and strongest, argument is that Fogleman lacks standing to pursue his retaliation claims because be did not engage in a protected activity under any of the asserted statutory provisions. Rather, be brings the claims as the son of another Mercy employee who asserted rights under the relevant acts. We agree that the claims do not survive summary judgment.

II. STATEMENT OF FACTS NOT IN GENUINE DISPUTE

The parties recite a litany of facts which have little or nothing to do with the motion for summary judgment.[1] We will attempt to summarize the facts as necessary for disposition of the motion.

Mercy operates the Mercy Hospital in Wilkes-Barre, Luzerne County, Pennsylvania. Fogleman began employment with Mercy Hospital in January, 1978, as a security officer. He was named Supervisor of Security at Mercy Hospital in 1992.

Fogleman's father, Sterril Fogleman, was employed at Mercy Hospital from January, 1976, through November 29, 1993. In 1994, Sterril Fogleman complained to the Equal Employment Opportunity Commission of discrimination under the ADEA and ADA. He also pursued a complaint before the Pennsylvania Human Relations Commission, and on June 30, 1995, commenced a civil action in this court which was docketed to No. 3:CV-95-0957 (assigned to Vanaskie, J., now

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[1] In addition to the unnecessarily lengthy statements of fact, the court was presented with an unnecessarily (and improperly) lengthy brief. Plaintiff moved to file a brief in excess of the limit under our Local Rules, and leave to file a brief up to 30 pages in length was granted. Apparently, 30 pages was not sufficient, since the brief is printed in a proportional font (Times New Roman) of 11 points, which is less than both the limit under our Local Rules, LR 5.1(c) (permitting proportional fonts of no less than 14 points) and the standard word processor default of 12 points. We think that thirty pages was sufficient for these purposes.

Chief Judge). The civil action was dismissed as settled in July, 1998.

Fogleman was not a party to his fathers actions before the EEOC, the PHRC, or this court, nor was be a witness or otherwise a participant When asked by a Mercy official if he knew anything about his father's case, Fogleman indicated that be did not, and stated that he would not discuss it even if he did.

On September 6, 1996, there was an incident involving Fogleman and Audrey Oeller, an employee at the Mercy Hospital Gift Shop. Oeller was in the shop before it opened when the door was unlocked by Fogleman. The circumstances of Fogleman's entry are in dispute, but it is clear that he generally did not have authority to be in the shop The reason be gave for being there and his actions while in the shop were inconsistent with the statement given by Oeller.

Purportedly based on the inconsistencies, as well as the failure to report the incident, Fogleman's employment was terminated. He claims that the real reason was Sterril Fogleman's claims against Mercy and that the incident in the gift shop is a pretext for retaliation by Mercy.

III. RETALIATION FOR "PROTECTED ACTIVITY"

The provisions barring retaliation in each of the asserted acts read as follows:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this

> chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 12203(a)(ADA).

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d) (ADEA).

> It shall be an unlawful discriminatory practice, unless based upon a bona tide occupational qualification, or in the case of a fraternal corporation or association, unless based upon membership in such association or corporation, or except where based upon applicable security regulations established by the United States or the Commonwealth of Pennsylvania:

> (d) For any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or bearing under this act.

43 Pa.Stat.Ann. § 955(d) (PHRA).

By their terms, each act prohibits retaliation against the person who actually opposes an unlawful discriminatory practice, referring to "such individual," and to no other person.

This is the reading of the ADEA given by the Fifth Circuit in Holt v. JTM Industries, Inc., 89 F.3d 1224 (5th Cit.), reh'g en banc denied, 105 F.3d 658 (5th Cir.1996) (table), cert.,'t. denied, 520 U.S. 1229, 117 S.Ct 1821, 137 L.Ed.2d 1029 (1997). In that case, a husband and wife were employees of the defendant when the wife's employment was terminated. She pursued a claim of age discrimination under the ADEA before the EEOC and the Texas Commission on Human Rights. About two weeks after the employer received notice of the administrative complaint, it placed the husband on administrative leave and later offered him a job in another part of the country. He quit after several weeks. Id. at 1225

The Fifth Circuit examined § 623(d) and pointed out that a third party may sue for retaliation under that provision

if the third person engages in the enumerated conduct even if the conduct is on behalf of another employee's claim of discrimination. Id at 1226. The problem in Holt was that the third party (the husband) had not participated in any way in enumerated conduct, either for himself or on behalf of the wife.

The Fifth Circuit discussed De Medina v. Reinhardt, 444 F.Supp. 573 (D.D.C. 1978), in which a wife sued for retaliation based on her husband's anti- discrimination activities. The Fifth Circuit pointed out that the opinion did not specit3t whether the wife had participated in her husband's activities. To the extent it could be read as stating as much, the Fifth Circuit simply disagreed. Holt at 1226.

The rationale of Holt is straightforward: The ADEA retaliation provision does not say that a third party may assert a claim for retaliation when that third party does not engage in protected activity. The protection from retaliation is limited by plain language to those persons who engage in protected activity, which is consistent with Congress' intent "to enable employees to engage in protected activities without fear of economic reprisal." Id. at 1226-1227. The problem with a rule allowing third-party standing is that the type of relationship which would confer such standing is undefined. Further, in most instances, the types of people who would be covered by an automatic standing rule will have participated in protected activity on the employees behalf, so that such a rule would add little to the scheme actually enacted by Congress. Id. at 1227.

To the rationale of the Fifth Circuit, we would add one more point In most cases in which the spouse of a complainant

suffers retaliation, it may be that the complainant might have standing to pursue the claim of retaliation, since the complainant would suffer financially from such action as well.

One other Court of Appeals has considered the question of automatic third- party standing under the civil rights statutes and has agreed with the Fifth Circuit:

> We believe that the rule advocated by Thomas--that a plaintiff bringing a retaliation claim need not have personally engaged in statutorily protected activity if his or her spouse or significant other, who works for the same employer, has done so--is neither supported by the plain language of Tide VII nor necessary to protect third parties, such as spouses or significant others, from retaliation. See [Holt]. Title VII already offers broad protection to such individuals by prohibiting employees from retaliating against employees for "assist[ing] or participat[ing] in any manner" in a proceeding under Title VII. Accordingly, we hold that a plaintiff bringing a retaliation claim under Tide VII must establish that she personally engaged in the protected conduct.

Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998) (brackets in original).

Fogleman concedes that the Third Circuit has not ruled on the issue of automatic third-party standing, but points to two district court opinions from within the Third Circuit which he contends represent the "overwhelming majority of

cases" and support his position. Actually, both cases are distinguishable.

In Aquino v. Sommer Maid Creamery, Inc., 657 F.Supp. 208 (E.D.Pa. 1987), plaintiffs were a husband and wife bringing claims under, inter aha, Title VII. The husband participated in a conciliation meeting before the Pennsylvania Human Relations Commission, and the district court held that this was protected activity for purposes of a retaliation claim under Title VII. Id. at 210. Thus, standing was not automatic but based on the husband's own conduct in participating in the proceedings.

More difficult is the opinion in Mandia v. ARCO Chemical Co., 618 F.Supp. 1248 (W.D.Pa.1985), in which the plaintiffs were again a husband and wife. The opinion is somewhat confusing because of the manner in which the court summarized its analysis at the opening of the discussion. It stated:

> With respect to the participation element, the evidence is clear that [the husband] participated, supported and aided his wife in the filing of the EEOC charge on November 3, 1982 with relation to sexual harassment. It is solely by reason of his wife's charge that he could be considered to have made any allegation of sexual harassment against his employer, and thus be engaged in a protected activity. We will concentrate on the evidence surrounding the claim that his discharge from employment arose out of the filing by his wife of a complaint under Title VII against her

> employer, the same employer as her husband's, the defendant here. This is retaliation against a third-party because of the filing of a Title VII complaint by a close relative. We conclude that Section 2000e-3 proscribes such retaliation. See DeMedina v. Reinhardt, 444 F.Supp. 573 (D.D.C.1978) and Kornbluh v. Stearns and Foster Co., 73 F.R.D. 307 (N.D.Ohio 1976).

Man dia at 1250 (emphasis in original; bracketed material adde d).

In other words, the court states that the husband enga ged in a protected activity, then states that the claim is one of retaliation based solely on his wife's Title VII comp plaint. Because the husband's own activity was protected, there e would be no reason for an automatic standing rule to be appli ied.

Moreover, the analysis in which the Mandia court enga ged confuses the matter further. The court pointed out that, while both the husband and the wife had made comp plaints about her treatment, those complaints had not inclu ded claims of sexual harassment. Id. at 125 1-1252. Also , when the wife finally made a complaint of sexual haras ssment to the EEOC, the decision already had been made to fir e the husband, and a determination not to reconsider the termi ination was made before the decision-maker leaned of the comp plaint Id. at 1252-1253. Above all of this, at the time that the d decision to fire the husband was made, the decision-maker did n not even know that the couple was married. Id. at 1253.

Given all of these facts, we are unable to see how the husband could possibly maintain a cause of action. It simply is impossible for an employer to retaliate with respect to a claim about which it is unaware, and it cannot retaliate by terminating a spouse's employment when it does not know that there is a spouse. In other words, the court found that (1) the husband was engaged in a protected activity but (2) he could not establish a causal connection between that activity (or his wife's activity) and the adverse employment decision. See esp. 618 F.Supp. at 1253 (finding of causal relation between discharge and wife's charge of sexual harassment "would be pure speculation"). An automatic standing rule is unrelated to this analysis.

Stated differently, the husband alleged that he engaged in protected activity on behalf of his wife, and be therefore had standing to pursue a claim of retaliation. The claim fails substantively because (1) the court found as a fact that the husband did not engage in protected activity because the timely complaints were not allegations of sexual harassment and (2) the employer was not aware of any claim of sexual harassment or that the couple were married before the decision to terminate the husband's employment had been made. Thus, despite a lengthy analysis related to standing, the claim of retaliation actually failed on the merits.

We therefore conclude that neither Mandia nor Aquino stands for the proposition for which they are cited. To the extent they are read as supporting the automatic standing rule, we disagree for the reasons stated herein and in Holt.

Fogleman also cites a "Guidance" issued by the EEOC on May 20, 1998, to support the proposition that he has

automatic standing to pursue his claim of retaliation. EEOC: Guidance on Investigating, Analyzing Retaliation Claims, Fair Employment Practices Rep. (BNA) No. 849, at 405:7581 (1998) (hereinafter cited as "Guidance"). As with Mandia and Aquino, the Guidance does not survive closer scrutiny, a conclusion we reach after traveling a rather circuitous route.

The Guidance provides in part:

> Title VII, the ADEA, the EPA [Equal Pay Act], and the ADA prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights. For example, it is unlawful to retaliate against an employee because his son, who is also an employee, opposed allegedly unlawful employment practices. Retaliation against a close relative of an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative, where both are employees. See Section 8-11 C.3. for discussion of similar principle under "participation" clause.
>
> The retaliation provisions of Title VII, the ADEA, the EPA, and the ADA prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights. For example, it would be unlawful for

> a respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge. Both spouses, in such circumstances, could bring retaliation claims.

Guidance at § 8-II.B.3.c., 8-II.C.3. (Fair Employment Practices Rep. at 405:7586, 7587)(footnotes omitted).

In the first quoted paragraph, the omitted footnote cites Murphy v. Cadillac Rubber & Plastics. Inc., 946 F.Supp. 1108, 1118 (W.D.N.Y.1996), for the proposition that the plaintiff may state a valid claim of retaliation based on his or her spouse's protected activities. Fair Employment Practice Rep. at 405:7586 n. 23. Once again, the opinion states that the husband also participated in the protected activity. See id. at 1117 (husband alleged that "be assisted and supported his wife in her request to leave her quality control position and return to her former union production job, and that he assisted and supported her in her complaints of discrimination .,."). Thus, the Murphy opinion suffers from the same shortcoming as Mandia. See esp. Murphy at 1118 (citing Mandia).

In the second paragraph quoted above, an omitted footnote reads:

> See, e.g., EEOC v. Ohio Edison Co., 7 F.3d 541, 544 (6th Cir.1993) (agreeing that plaintiffs allegation of reprisal for relative's protected activities states claim under Title VII); Thurman v. Robertshaw Control Co., 869 F.Supp. 934, 941 (N.D.Ga.1994) (plaintiff could make out first element of prima fade

> case of retaliation by showing that plaintiff's close relative participated in the complaint process).
>
> The Commission disagrees with the Fifth Circuit's holding in [Holt] that there was no unlawful retaliation where the plaintiff was put on paid administrative leave because his wife had filed an age discrimination charge.

Fair Employment Practices Rep. at 405:7587 n. 27 (parallel citations omitted).

While the Sixth Circuit in Ohio Edison purported to be relying on De Medina and its progeny, in the end its holding differed from those cases. Rather than concluding that a complainant's relative has automatic standing to sue for retaliation under Title VII. it held that a plaintiff may bring an action for retaliation based on the protected activity of a person acting on the plaintiffs behalf. See 7 F.3d at 545-546 (Title VII anti-retaliation provision "should be broadly construed to include a claim in which an employee, or his representative, has opposed any practice may an unlawful employment practice"; emphasis in original). In fact, the person who engaged in the protected activity was an unrelated coworker, not a relative. Id. at 542.

For its part, the court in Thurman simply cited Mandia and Ohio Edison without analysis. 869 F.Supp. at 941,941 n. 3.

A number of the cases reaching the conclusion that a plaintiff may bring an action for retaliation rely on the

reasoning set forth in cases discussing the problem of a former employee suing. That is, a plaintiff may have been an employee of the defendant at one time, then suffer a termination of that employment for a prohibited reason. In such a case, a literal reading of the civil rights statutes would preclude a civil action because only an employee or applicant for employment may sue. However, the courts have consistently held that a former employee may bring an action under such circumstances. See generally Ohio Edison at 544-545 (collecting cases).

There is a major difference in the principles of interpretation applicable in those cases, however. Title VII makes it unlawful, inter alia, for an employer to discharge an employee because of the employee's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). A person aggrieved by such an unlawful employment practice may bring a civil action after exhausting available administrative remedies. 42 U.S.C. § 2000e- 5(f). There is thus a tension between the definition of employee as a "person employed by an employer," 42 U.S.C. § 2000e(f), and the provisions allowing an employee to bring an action: the employee is not an employee (having been discharged) at the time of the filing of the claim or complaint. Given this tension, which may be termed an ambiguity, the term "employee" is subject to interpretation or construction, and inclusion of former employees within its definition is consistent with the purpose of Title VII. Indeed, inclusion of former employees within the meaning of "employee" is the only way that the rights of a discharged employee can be protected and the goal of Title VII fulfilled under these circumstances.

In contrast, Fogleman points to no similar tension or ambiguity within the anti-retaliation provisions of the ADA, ADEA, or PHRA, nor does any court which authored any of the opinions cited by Fogleman, and we are able to discern none. It is therefore improper to interpret the statutes in any way other than by their plain language.

We return, then, to the Guidance and the view of Title VII, the ADEA, the EPA, and the ADA offered by the EEOC. Generally, in the absence of a direct expression of congressional intent, a court must defer to an agency's interpretation of its governing statute. Sandoval v. Reno, 166 F.3d 225, 229 (3d Cir.1999) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Congressional intent on the precise question at issue is ascertained by employing traditional tools of statutory construction. Sandoval at 240 (citing Chevron at 843 n. 9, 104 S.Ct. 2778).

Each of the anti-retaliation provisions quoted above states that an employer may not retaliate against a person who opposes an unlawful discriminatory practice or a person who participates in proceedings related to a charge of unlawful discrimination. The statutes are clear in referring to retaliation against "such person," meaning the person who actually opposed the practice or participated in the proceedings. In plain, unmistakable English, Congress has limited claims of retaliation to adverse acts taken against "such person[s]." The Guidance by the EEOC therefore is contrary to the statutes at issue, and we will not defer to the EEOC's view of the statutes.

IV. ALTERNATIVE ARGUMENTS

As an alternative, Fogleman contends that be engaged in protected activity by telling his superior that he did not know anything about his father's suit. We fail to see how refraining from engaging in protected activity can be considered to be protected activity, and no statutory language supports this argument.

Fogleman also contends that he has a cause of action because Mercy perceived of him as engaging in a protected activity. Once again, no statutory language indicates that a person perceived in this manner is to be considered as engaged in a protected activity for purposes of the anti-retaliation provisions. Cf. U.S.C. § 12102(2)(C) (under ADA, "disability" includes being regarded as having an impairment).

V. CONCLUSION

As stated by the Fifth Circuit in Holt, and as reiterated by the Eighth Circuit in Smith, the plain language of the civil rights statutes' anti- retaliation provisions is to the effect that only a person who actually engages in protected activity may bring an action for retaliation. There is no ambiguity in the language employed, and there is no tension between the anti-retaliation provisions and the remainder of the acts. The plain language therefore governs.

Fogleman may not maintain an action alleging retaliation based on his father's prior suit, standing alone. He must allege and prove that he engaged in protected activity, and he has not done so.

The motion for summary judgment will be granted with respect to Counts I, II, and III. An order consistent with this memorandum will issue.

/s/ James. F. McClure Jr.
United States District Judge

(2)

Supreme Court, U.S.
FILED
JUL 19 2002
CLERK

No. 01-1843

IN THE

Supreme Court of the United States

MERCY HOSPITAL, INC.,

Petitioner,

v.

GREGORY FOGLEMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an individual has standing to assert a claim pursuant to 42 U.S.C. § 12203(b) against his employer under the Americans With Disabilities Act ("ADA") alleging that he was discriminated against because a relative and co-employee had previously filed an ADA claim against the employer where the individual did not assert any rights under the ADA and did not participate in any way in his co-employee's ADA claim.

2. Whether an individual who was perceived by an employer to have participated in a claim under the Americans with Disabilities Act has standing to sue for alleged discrimination.

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REASONS FOR DENYING THE WRIT

A. The Circuit Court's Decision Is Not In Conflict With Decisions In Other Circuits.

Petitioner, Mercy Hospital, asserts that the decision of the United States Court of Appeals for the Third Circuit created a conflict among the Circuits. However, no such conflict exists. Specifically, Petitioner argues that there is a conflict in the Circuits, citing *Holt v. JTM Industries, Inc.*, 89 F.3d 1224 (5th Cir. 1996), and *Smith v. Riceland Foods, Inc.*, 151 F.3d 813 (8th Cir. 1998), as being in conflict with the instant case.[1] However, the Circuit Court's decision herein is consistent with both *Holt* and *Smith* with respect to the retaliation provisions of the ADA (and the Age Discrimination in Employment Act ("ADEA")). Moreover, neither *Holt* nor *Smith* addressed the other two issues decided by the Circuit Court. Accordingly, there is no conflict among the Circuits.

In this case, the Circuit Court decided three issues, the first of which related to the ADA, 42 U.S.C. § 12203(a)

1. In *Holt*, the United States Court of Appeals for the Fifth Circuit held that the plain language of the ADEA did not confer automatic standing upon a relative of an individual who participated in protected activity under the retaliation provision of the statute. In *Smith*, the Eighth Circuit determined that the plaintiff could not establish the causation element of her *prima facie* case of retaliation discrimination under Title VII because she could not establish that her employer was aware of her relationship to her boyfriend, who had filed a claim against their common employer. While the *Smith* decision did not analyze the issue in the context of automatic standing, the Court ultimately dismissed the plaintiff's retaliation claim because she could not establish that the employer's decision to terminate her was motivated by anti-discriminatory animus.

(the "Retaliation Provision") (and similar provisions under the ADEA and PHRA). The Third Circuit held, in accordance with *Holt* and *Smith*, that Respondent, Greg Fogleman, could not bring a retaliation claim against his employer when he had not participated in any way in his father's lawsuit against their common employer. Thus, with respect to the Retaliation Provision of the ADA, *the decision of the Third Circuit Court of Appeals is wholly consistent with the holdings in Holt and Smith.*

The Third Circuit's decision did not end there, however. The Circuit Court next analyzed a separate provision of the ADA, 42 U.S.C. § 12203(b) (the "Interference Provision") as it applied to Respondent. Specifically, the Interference Provision of the ADA provides:

> It shall be unlawful to coerce, intimidate, or interfere with any individual in the exercise or enjoyment of or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by this chapter.

42 U.S.C. § 12203(b).

The Circuit Court analyzed this issue independently from the Retaliation Provision, and reached a different conclusion, based in part, on the "more broadly" sweeping language of the Interference Provision. *See* Circuit Court Opinion at 15a. Notably, neither *Holt* nor *Smith* addressed this issue at all. After comparing the language of the Interference Provision of the ADA to the interference provision of the National Labor Relations Act ("NLRA"), the Circuit Court held that the broad Interference Provision of the ADA permits the Respondent to proceed in his third-party retaliation

claim against Petitioner. Circuit Court Opinion at 16a-17a. This holding is consistent with cases within and without the Third Circuit under the NLRA. *See Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.3d 400, 407-409 (3d Cir. 1990) (holding that retaliation against individual because her family members supported unionization effort violated interference provision of NLRA); *Tasty Baking Co. v. NLRB*, 352 F.3d 114, 127-128 (D.C. Cir. 2001) (collecting cases) (holding that demotion of wife because of union organizing efforts of husband violated interference provision of NLRA); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-1089 (7th Cir. 1987) (holding that firing of mother because of co-employee son's union activities violated interference provision of NLRA). Circuit Court Opinion at 16a.

Petitioner submits that this second holding of the Circuit Court was in error, but confuses the issue by suggesting that this holding is in conflict with *Smith* and *Holt*. As discussed *supra*, *Smith* and *Holt* did not address the interference provisions of any statute. Rather, those decisions were limited to an analysis of the retaliation provisions of the discrimination statutes. In fact, the statutes at issue in *Holt* (ADEA) and *Smith* (Title VII) do not even have interference provisions in addition to the retaliation provisions contained in those statutes.

Petitioner also suggests that conferring standing to Respondent under the Interference Provision after refusing to confer standing upon Respondent under the Retaliation Provision negates the significance of the Retaliation Provision. Nothing could be further from the truth. The separate statutory provisions apply to different situations, and the Court analyzed the language of both statutes. In its Petition for Writ of Certiorari, Petitioner cites no authority supporting its position that the Circuit Court's analysis under the Interference Provision was flawed, and points to no Circuit opinions that are in conflict

with the Circuit Court's decision with respect to the Interference Provision. Moreover, Respondent is not aware of any decisions in other circuits which are in conflict with the Circuit Court's interpretation of the Interference Provision. Thus, there is no conflict within the Circuits with respect to the Interference Provision of the ADA. Accordingly, the Petitioner's erroneous suggestion that the Third Circuit's decision with respect to the Interference Provision of the ADA is in conflict with *Holt* and *Smith* has no merit. The only aspect of the Third Circuit's opinion that can be fairly compared to *Smith* and *Holt* is the first aspect of the holding (regarding the Retaliation Provision), which is wholly consistent with *Holt* and *Smith*.[2]

B. The Circuit Court's Decision Is Consistent With Decisions Of This Court Under The ADA.

In its Petition, the Petitioner argues that the Circuit Court's opinion is contrary to recent decisions of this Court. In support of its position, Petitioner cites *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002); *Murphy v. United Parcel Service*, 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999); *Sutton v. United Airlines*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999); and *Chevron USA, Inc. v. Echazabal*, __ U.S. __, 122 S. Ct. 2045, __ L. Ed. 2d __ (2002). However, none of these cases relates to any of the issues decided by the Circuit Court. Rather, these cases relate to determining whether the plaintiffs were disabled under the ADA, an issue that is not,

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2. Petitioner's public policy argument is similarly without merit. Certainly, the intent of an individual can be proven by direct or indirect evidence and does not require live testimony. Moreover, Respondent is not aware of any "absolute right to terminate at will employees" for discriminatory reasons.

and never has been, raised in this case. Accordingly, there is nothing in the Circuit Court's opinion that is in any way inconsistent with any of the cases decided under the ADA by this Court.

C. The Circuit Court's Decision With Respect To Respondent's Perception Theory Is Consistent With Circuit Law.

The third holding of the Circuit Court relates to Respondent's perception theory of liability. The Court held that the perception theory of liability does not contradict the plain text of the discrimination statutes and that the retaliation provisions directly support a perception theory of discrimination in light of a discriminatory motive of the employer. Circuit Court Opinion at 18a-19a. If the employer engaged in the practice of making decisions based on certain illegal criteria, it has engaged in discrimination. Accordingly, the law will protect the employee, even if the employer's discriminatory motive was based upon a mistaken fact. Specifically, the Court held that, "the law focuses on the employer's subjective reasons for taking adverse action against an employee, so it matters not whether the reasons behind the employer's discriminatory animus were actually correct as a factual matter." Circuit Court Opinion at 18a. The Circuit Court utilized an analogy which bears repeating:

> Imagine a Title VII discrimination case in which an employer refuses to hire a prospective employee because he thinks that the applicant is a Muslim. The employer is still discriminating on the basis of religion even if the applicant he refuses to hire is not in fact a Muslim. What is relevant is that the applicant, whether Muslim

> or not, was treated worse than he otherwise would have been for reasons prohibited by the statutes . . . Accordingly, we hold that if Greg can show as he claims that adverse action was taken against him because Mercy thought that he was assisting his father and thereby engaging in protected activity, *it does not matter whether Mercy's perception was factually correct.*

Circuit Court Opinion at 18a-19a (emphasis added).

As the Circuit Court noted, its holding with respect to the perception theory is consistent with other labor law cases in the Third Circuit. *See Fogerty v. Boles*, 121 F.3d 886, 891 (3d Cir. 1997); *Brock v. Richardson*, 812 F.2d 121, 125 (3d Cir. 1987). Circuit Court Opinion at 19a. Moreover, Petitioner points to no authority in any Circuit that is in conflict with the Circuit Court's decision with respect to Respondent's perception theory of liability, and Respondent is not aware of any opinions in the sister circuits which conflict with the Circuit Court's Opinion on this issue.

CONCLUSION

For the aforementioned reasons, there is no reason to grant Petitioner's Petition for Writ of Certiorari. Moreover, the decision of the Circuit Court is consistent with Third Circuit and other Circuit Court opinions. Accordingly, Respondent respectfully requests that this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

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